

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

COPY

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
4078-s41P BY HAROLD A. PHILIPPS

} FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Administrative Procedure Act, a hearing on this application and the objections thereto was held on October 1, 1975, in Conrad, Montana. The Applicant, Harold A. Philipps, ably represented himself at the hearing. All objectors except John A. Wood and Evelyn E. Wood were represented by Peter M. Kirwan, Esq., of Bozeman, Montana. A representative of Mr. and Mrs. Wood attended the hearing but presented no testimony or evidence. The Department presented a number of exhibits, which were received without objection and which have been made a part of the hearing record.

A Proposed Order (Proposal for Decision) was issued by the Hearing Examiner, Allan Chronister, on November 3, 1975.

The Proposed Order as issued provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the Administrator.

On November 17, 1975, the Department received an Exception dated November 13, 1975, filed by Peter M. Kirwan on behalf of his client, Pondera Coulee and Tributary Water Users Association, in opposition to the Hearing Examiner's Proposed Order of November 3, 1975, in the matter of Application No. 4078-s41P by Harold A. Philipps.

On December 22, 1975, the Department received Mr. Kirwan's Brief supporting the exception in opposition to the Proposed Order, dated December 18, 1975, filed on behalf of his client, the Pondera Coulee and Tributary Water Users Association.

Harold A. Philipps, the Applicant in this matter, was informed by the Department's letter of January 7, 1976, that he had an opportunity to file a Reply Brief within fifteen (15) days after receipt of the Department's letter, since Mr. Kirwan had filed a brief supporting the exception, dated December 18, 1975, and filed on behalf of his client, the Pondera Creek and Tributary Water Users Association. A copy of Mr. Kirwan's Brief was enclosed with the

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Department's letter to Mr. Philipps. A copy of said letter to Mr. Philipps was also sent to Mr. Kirwan.

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On January 26, 1976, the Department received a Reply Brief dated January 22, 1976, from Mr. Philipps in reply to the Exception and Brief filed by Mr. Kirwan.

The Department by its letter of February 4, 1976, to Mr. Kirwan and a copy to Mr. Philipps, informed both parties that they should reply in writing within seven (7) days after receipt of said letter, indicating if they wished to pursue this matter to an oral argument hearing before the Water Resources Division Administrator, and further, if they did not wish to pursue this opportunity, the Administrator would prepare and issue a Final Order on the record at present in the application file.

On February 11, 1976, the Department received a reply from Mr. Kirwan to the Department's letter of February 4, 1976, in which he requested an oral argument hearing on his client's exceptions before the Water Resources Division Administrator.

The Department by its letter of February 19, 1976, to Mr. Kirwan with copies to Mr. Philipps and Harvey Hollandsworth, president of the Pondera Coulee and Tributary Water Users Association, informing them that since oral argument had been requested this matter would be forwarded to the Administrator of the Water Resources Division for scheduling of a hearing and further, that all parties would be notified by certified mail when the hearing date, time, and place was selected.

The Administrator of the Water Resources Division issued on March 2, 1976, a Notice of Hearing on Exceptions in the matter of Application No. 4078-s41P by Harold A. Philipps, stating that a hearing would be held on Wednesday, March 31, 1976, at 1:30 p.m., before the Administrator of the Water Resources Division in Room 211 or the Conference Room, as the situation may require, of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. This Notice of Hearing on Exceptions was mailed by certified mail to all parties in this matter.

The requested oral argument hearing was held in Helena, Montana, on March 31, 1976, at approximately 1:30 p.m., in the Department Conference Room before the Water Resources Division Administrator, for the purpose of hearing oral arguments in support of the written objections, exceptions, and briefs.

Mr. Philipps, the Applicant, appeared on his own behalf and ably represented himself and presented testimony in support of his Application, Proposed Order, and Reply Brief as filed.

Mr. Kirwan, attorney for the objectors and exceptors, appeared on their behalf and presented testimony in support of their objections, exception, and brief.

The hearing was also attended by several Department personnel, other than the Water Resources Division Administrator.

The Administrator of the Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposed Order dated November 3, 1975, the application, objections, exceptions, briefs, the testimony of the oral argument hearing held on March 31, 1976, and all pertinent information and documents filed by parties to this matter and made a permanent record of the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on November 3, 1975, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby modified as follows:

FINAL ORDER

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 4078-s41P to appropriate when available and not needed to satisfy prior water rights downstream on Pondera Coulee, 6,400 gallons per minute or 14.2 cubic feet per second, not to exceed 100 acre-feet per year of water from Pondera Coulee, to be diverted from Pondera Coulee, a tributary of the Marias River, at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, Township 28 North, Range 1 West, M.P.M., Pondera County. Said water will be pumped from the above point of diversion by means of a 75-horsepower pump to a 100-acre-foot-capacity offstream storage reservoir, located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, Township 28 North, Range 1 West. Water from Pondera Coulee can only be diverted and pumped into the offstream storage reservoir when available and not needed to satisfy prior downstream water rights during the period of February 1 through April 15, inclusive, of each year. The stored reservoir water will be released from the reservoir into Pondera Coulee and rediverted from Pondera Coulee during the irrigation season at two points, one in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25 and another in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25, both in Township 28 North, Range 1 West, and used for supplemental irrigation purposes on 475 acres in Section 25 and 42 acres in Section 24, all in Township 28 North, Range 1 West, and containing a total of 517 acres, more or less.

2. The Permittee must at all times allow at least 6 cubic feet of water per second to pass the new point of diversion on Pondera Coulee for the offstream storage reservoir to satisfy prior downstream water rights during the allowable

diversion period of February 1 through April 15, before water may be pumped from Pondera Coulee into the offstream storage reservoir. This flow of 6 cubic feet per second is and shall be subject to change in the future if the Department determines that more water must be left in Pondera Coulee to protect prior existing water rights.

3. The Permittee must install and maintain an adequate measuring device at a point at or below the new point of diversion for the offstream storage reservoir to ensure that prior downstream water rights as noted in (2) above are being satisfied. Further, the Permittee must keep and maintain a record of all measurements taken, and shall supply said records to the Department upon request.

4. The Permittee must also install and maintain an adequate flowmeter or other applicable measuring device on the new pumping facility, which will pump water into the 100-acre-foot-capacity storage reservoir during the period of February 1 through April 15. Records must also be kept and maintained, and supplied upon request to the Department.

5. The Permittee's offstream storage reservoir must meet all local Soil Conservation Service designs and specifications for a reservoir of this type, including the reservoir release structure back into Pondera Coulee to insure proper construction and safety of the structure. Maintenance of the reservoir must further be completed on the structure as needed.

6. The Permittee under this Permit is only entitled to divert at the two downstream diversion points on Pondera Coulee those waters which have been released from the offstream storage reservoir for use as supplemental irrigation waters as granted by this permit. (This condition does not affect those certain prior rights to which the Permittee has been beneficially using and is entitled to by law.)

7. The Permittee will cooperate with other water users in scheduling his withdrawals so that his periods of diversion will not adversely affect prior water rights.

8. The Provisional Permit is granted subject to all prior existing water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

9. It shall be the responsibility of the objectors to notify the Permittee when, in fact, there is insufficient water in Pondera Coulee to satisfy both the prior rights of the objectors and the water use granted by this permit. It shall be the responsibility of the Permittee to cease diverting water immediately pursuant to this permit when there is insufficient water in Pondera Coulee to satisfy both the prior rights of the objectors and the water use granted by this

permit, whether or not he is notified by the objectors. It shall be the responsibility of each of the parties not to abuse his water rights at the expense of the other, since these conditions, at least for the present, must be essentially self-policing.

10. The issuing of this Provisional Permit by the Department in no way reduces the Permittee's liability for damages caused by the Permittee's exercise of his Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water diverted and used for their own protection and proof of their water rights.

Done this 26th day of August, 1976.

Orin Harris
Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

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BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
4078-s41P, HAROLD L. PHILIPPS) PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts, a hearing on this application and the objections thereto was held on October 1, 1975, in Conrad, Montana. The applicant, Mr. Harold A. Philipps, ably represented himself at the hearing. All objectors except John A. Wood and Evelyn E. Wood were represented by Peter M. Kirwan, Esq. of Bozeman, Montana. A representative of the Woods attended the hearing but presented no testimony or evidence. The Department presented a number of exhibits which were received without objection and which have been made a part of the hearing record.

MEMORANDUM

Mr. Philipps' application, filed November 6, 1974, seeks to appropriate water from Pondera Coulee (or Creek) at the rate of 6400 gallons per minute, or 14.2 c.f.s., up to 100 acre feet per year. Water from the point of diversion from the coulee in the NW1/4 SE1/4 NW1/4, S. 25, T. 28N., R. 1W., Pondera County, is to be pumped to a 100-acre foot capacity off-stream storage reservoir by a 75-horsepower electric pump. Mr. Philipps plans to divert water into the reservoir when available from February 1 to April 15, and to release stored water into the stream later in the irrigation season. The reservoir can be filled in 3 to 4 days if the pump can be run at capacity. The released water would be re-diverted from the stream at two points, one just at the reservoir outlet and another some distance downstream, to sprinkler

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irrigate about 517 acres of land.

Mr. Philipps needs this water to supplement a claimed 1964 filed right to 6 c.f.s. from the Creek by making the water supply more dependable. Since the capacity of his existing irrigation pumps is 6 c.f.s. and will not be increased, that is the maximum amount of water that would be withdrawn from the Creek during the irrigation season.

Pondera Coulee is apparently not a perennial stream, but rather experiences a peak early spring flow, and a minimal and sometimes non-existent late summer flow. Further, the summer flow is greatly dependant upon the waste water return flow into the Coulee from the Pondera County Canal and Reservoir Company system, which draws water from Lake Francis. The major use of the Coulee basin below Mr. Philipps, and certainly the major use among the objectors, is for stock raising. Sheep and cattle predominate. Many of the operators depend upon the Coulee for the majority of their stock water when the water is there. Water which collects in deep pools in the streambed and in pits dug into the streambed is used during the winter. There are also a number of shallow wells adjacent to the stream which supply stock water.

Year-to-year water flow down the Coulee is highly variable, depending both upon the weather and upon the amount of water released by the Canal Company. Further, since the Coulee is long and highly meandered, water will sometimes be flowing in one area and not in another area downstream. This may be due to the fact that surface

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runoff and seepage contribute flow throughout the stream's lengths, and that the runoff can vary area to area. It may also be due to the presence of large areas of gravel which, according to their level of saturation, can absorb some water as it flows by.

The objectors generally were concerned that water continue to flow down the Coulee for their stock when they have enjoyed it in the past, and that the bed and banks of the Coulee be sufficiently saturated to allow late-season flows to pass the entire length of the stream. This saturation is felt to come primarily from early season high-water flows, and is especially important in the areas of extensive gravel beds. During the late season water can flow through the Coulee very slowly, and thus its chances for evaporation or seepage are high.

Recognizing these problems, Mr. Philipps has orally amended his application to agree to a condition that he never draw the stream below a level of 6 c.f.s. at his point of diversion for the reservoir. This figure was apparently mentioned as reasonable at some water-users meetings, although there was general agreement that much of the 6 c.f.s. would be lost to use, seepage and evaporation by the time it reached the lower portions of the stream.

Since the applicant will not pump into his reservoir after April 15, he will not directly affect irrigators and other later-season water users. In the average or above-average flow year, the Applicant's pumping of 14.2 c.f.s. for 3 to 4 days would have little real effect upon downstream users. For example, in the extremely high flood of

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June, 1964, the Coulee was flowing 1950 c.f.s. at a county road crossing 19 miles southwest of Chester. This flow reached a level of 12.5 feet at that bridge, while the flows of May and June, 1975, reached levels of 11.6 and 10.7 feet, respectively. When compared to the record of 1964, the flow in 1975 was quite high. Apparently no other flow data is available.

It is conceivable that there will be extremely dry years of low flow, short duration runoff. If these years are coupled with low waste water discharge by the Canal Company, a critical water shortage could result for downstream users. Lightly-saturated gravel beds could absorb significant amounts of water. The problem then is insuring that the applicant's project will not compound the problem in such years and thereby deprive downstream users with prior rights. The applicant has offered to never pump the stream below the 6 c.f.s. level, although there is no firm evidence that this would solve the problem in dry years. Some of the objectors seemed to feel that more water would be necessary, but no one could say how much more.

The following persons testified and presented evidence at the hearing:

1. Mr. Ramsey Offerdal is located 4 to 5 miles below the applicant's reservoir site. He claims filed irrigation appropriations dating from 1898 (3000 miners inches) and

1900 (4 c.f.s.). His place was last irrigated in 1955, when the practice was ceased due to severe alkaline problems. The land has long been used for stock raising, and about 150 head currently water from the Coulee.

Testimony was also offered for Oliver Offerdal, Ramsey's father, whose place is located 1.5 to 2 miles from the applicant. The elder Offerdal currently runs 30 pairs which water from the Coulee. In the winter when the Creek is frozen, shallow (10 to 12 foot) wells adjacent to the Creek are used for stock. No testimony was given indicating that the applicant's pumping would adversely affect any existing or planned irrigation on either Offerdal place.

2. Mr. Arthur Johnson is located about 10 miles downstream from the Offerdals. Mr. Johnson apparently claims one-half of a water right for 3 c.f.s. filed in 1903 for irrigation purposes. About 8 acres are currently irrigated, and 2 to 3 horses are watered from the Coulee. Mr. Johnson has never seen any of the old irrigation structures evident on the place in use.

3. Mr. Ernest Stordahl, representing himself and his father, is located just downstream from Mr. Johnson. They claim the other half of Mr. Johnson's 1903 right for 3 c.f.s., in addition to a 1955 filing for 2 c.f.s. The latter right is currently used to irrigate 40 acres, which

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they hope to increase. They now run 32 animal units of cattle which water from the Creek. During the February-April period they rely upon a seepage well 200 feet from the Creek for stockwater, or upon pools in the Creek bed.

4. Mrs. Diana Harris appeared for Gary D. Harris, Edna Harris Peters and the Peters Ranch, Inc. The Harris property is 20-25 miles below the applicant and is a range cattle operation currently running 100 pairs. The cattle generally water from the Creek, although 3 runoff reservoirs are also used. The applicant's project would adversely affect the Harrises only if all the runoff were diverted above them. A 6 c.f.s. flow leaving the applicant's place would probably supply their cattle with sufficient water.

5. Mr. Harvey Hollandsworth appeared for himself and the Pondera Water Users Association. Mr. Hollandsworth's 13000 acres are located about 25-30 miles from the applicant, and he runs a sheep operation with 1200 ewes year-round, with a high of about 2700 in the summer. The Creek is the main source of Mr. Hollandsworth's stockwater. No filed rights were found to exist, but the ranch has long been used to raise sheep.

6. Mr. Wayne Arnold appeared for his father Fred, who has a cattle ranch which runs a maximum of about 145 head. All stock drink from the Creek when water is available, either flowing or from dammed ponds in the fall and winter.

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7. Mr. Marvin Cheek appeared for himself and his brother Donald. Together they own about 5400 acres, upon which they graze about 175 cattle. Their primary source of stockwater is the Creek, and they claim a filed right to water 175 cattle dating from 1962.

8. Mr. Allen Kolsted owns about 17,000 acres which he uses for a grain-livestock operation. He runs 800-1000 yearlings or about 400 cows that water from the Creek or from reservoirs filled from the Creek. He usually does not winter cattle on the Creek.

9. Mr. Olaf Smedsrud did not file an objection but was allowed to testify as to his notice of appropriation filed June 28, 1973, for 20 c.f.s. of irrigation water from the Creek. No structures or systems have yet been constructed to use this water.

10. Mr. Kenneth Broadhurst runs about 200 cattle which are watered from the Creek, and also from two wells located within 10 feet of the Creek. These have never been dry, but have been very low. Mr. Broadhurst irrigates about 70 acres of alfalfa from the Creek pursuant to Permit No. 1380-s41P to appropriate 1.34 c.f.s. after April 15.

11. Mr. Joseph Broadhurst runs about 140 pairs which water from the Creek in the late winter and early spring.

12. Mr. Robert Pugsley owns the last ranch on the Creek as it runs into the Marias River. The Creek is one of his sources of stockwater.

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PROPOSED FINDINGS OF FACT

1. Mr. Harold Philipps has applied to divert 14.2 c.f.s. up to 100 acre-feet per annum, from Pondera Coulee to be stored from February 1 to April 15 for irrigation use later in the summer.

2. The objectors claim existing rights to the use of Pondera Coulee waters for irrigation and stockwatering as discussed in the Memorandum above.

3. The flow of Pondera Coulee is highly variable, both from year to year and from area to area along the Coulee. The flow comes primarily from melting snowpack in the early spring, from irrigation waste water from the Pondera County Canal and Reservoir Company System, and from precipitation as it falls.

4. To help insure the availability of whatever water is flowing into the Coulee, the bed and banks need to be adequately saturated by the spring runoff.

5. The applicant has agreed to never pump the level of the Coulee below 6 c.f.s. as it leaves his place.

6. The time of critical relationship between the Applicant's pumping and the Objectors' existing water usage will be in dry years of low level, short duration runoff.

7. The applicant's project will not directly affect any of the objectors' existing irrigation uses since the applicant will not pump later than April 15.

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PROPOSED CONCLUSIONS OF LAW

1. During the period of February 1 through April 15 there are usually unappropriated waters flowing in Pondera Coulee past the applicant's proposed point of diversion.

2. Conditioning the applicant's permit subject to all prior existing water rights and requiring that he not pump the Coulee dry will adequately protect prior existing water rights.

PROPOSED ORDER

The Applicant's permit should be granted as applied for to allow him to pump water when available and flowing past his point of diversion, subject to the following:

1. That the applicant devise and install a device suitable to the Department to measure the flow of water in Pondera Coulee at a point at or below the point of diversion into his reservoir.

2. That the applicant at all times when water is flowing during the period of February 1 through April 15 allow at least 6 cubic feet of water per second to pass the point of diversion into his reservoir. This level is and shall be subject to change in the future if the Department determines that more water must be left in Pondera Coulee to protect prior existing water rights.

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NOTICE

This is a Proposed Order and will become final when accepted by the Administrator, Department of Natural Resources and Conservation Water Division. Written exceptions to this Proposed Order shall be filed with the Department within ten (10) days of receipt of same. Upon receipt of any written exceptions by the Department, opportunity will be provided to file briefs and to make oral arguments before the Administrator, Water Resources Division.

DATED this 3d day of November, 1975.



HEARING EXAMINER

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